

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD J. ZALAC,

Plaintiff,

v.

CTX MORTGAGE CORPORATION, a
Delaware Corporation; *et al.*,

Defendants.

NO. 2:12-CV-01474

**REPLY TO CTX MORTGAGE
CORPORATION'S OBJECTION TO
PLAINTIFF'S PROPOSED ORDER OF
DISMISSAL WITHOUT PREJUDICE**

In Reply to Defendant CTX Mortgage Corporation's Objection to Plaintiff's Proposed Order of Dismissal, Without Prejudice, Plaintiff offers the following.

CTX Mortgage Corporation's reliance upon *CR 7(d)(3)* is misplaced. *CR7(d)(3)* provides as follows:

(3) All other nondispositive motions, except motions seeking a preliminary injunction, shall be noted for consideration no earlier than the third Friday after filing and service of the motion; and all dispositive motions and motions seeking a preliminary injunction shall be noted for consideration no earlier than the fourth Friday after filing and service of the motion. Any opposition papers shall be filed and served not later than the Monday before the noting date. If service is by mail, the opposition papers shall be mailed not later than the Friday preceding the noting date. Any reply papers shall be filed and served no later than the noting date.

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KOVAC & JONES PLLC

ATTORNEY AT LAW
2050 - 112th Avenue N.E.
Suite 230
Bellevue, Washington 98004
(425) 462-7322

1 Nothing in *CR 7* addresses the lodging of Orders.

2 Defendant's assertion that there is no authority to justify Plaintiff's lodged Order is mistaken. Under *Rule*
 3 *12(b)(6)*, the Court may only dismiss if the Complaint fails to allege "enough facts to state a claim to relief that is
 4 plausible on its face." *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007). This
 5 requirement was further clarified by the Supreme Court decision that a Complaint "has facial
 6 plausibility when Plaintiff pleads factual content that allows the Court to draw a reasonable
 7 inference that the Defendant is liable for the conduct alleged". *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949
 8 (2009). This does not mean the Plaintiff must prove his allegations because the Court must accept Plaintiff's factual
 9 allegations as true. *Id.*, at 1949.

10 More importantly, should Federal Courts within the Ninth Circuit decide that dismissal
 11 of a claim is appropriate, pursuant to rule *FRCP 12(b)(6)* the Court should grant leave to amend
 12 even if no request to amend has been made, unless the Court determines that the pleadings could
 13 not possibly be cured by the allegation of other facts. *Breier v. Northern California Bowling*
 14 *Proprietors' Ass'n*, 316 F.2d 787 (9th Cir. 1962); *Doe v United States*, 58 F.3d 494, 497 (9th Cir.
 15 1994); *Straight v. Approved Federal Savings Bank*, 2005 Westlaw WL 1288091 (Western
 16 District Washington 2005). As noted in the case of *Breier v. Northern California Bowling*
 17 *Proprietors' Ass'n*, supra at p 789: "Neither the filing nor granting of such a Motion before
 18 Answer terminates the right to Amend; an Order of Dismissal Denying Leave to Amend at that
 19 stage is improper, and a Motion for Leave to Amend (though unnecessary) must be granted if
 20 filed".

21 Based upon the foregoing case law, Plaintiff's request for entry of an Order of Dismissal,
 22 without Prejudice, is appropriate. While CTX Mortgage Corporation's involvement in this
 matter may at first blush seem remote in time, Discovery may reveal facts that would give rise to

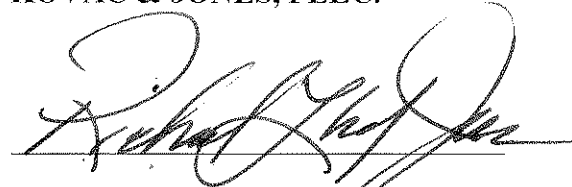
1 additional causes of action against CTX Mortgage Corporation that are not now apparent. To
 2 enter an Order “without Prejudice”, would improperly deny Plaintiff the ability to amend its
 3 pleadings to assert additional facts and claims against CTX Mortgage Corporation.

4 On the basis of the foregoing, it must be remembered that CTX Mortgage Corporation
 5 was the entity that introduced MERS into the transaction at the outset, an entity that the
 6 Washington Supreme Court has recently determined to be “ineligible beneficiary”. See *Bain v.*
 7 *Metropolitan Mortgage Group, Inc.*, Washington Supreme Court Case No. 86201-1, and
 8 *Selkowitz v. Litton Loan Servicing, LP*, Washington Supreme Court Case No. 86207-9, ____
 9 Wn.2d ___, ____ P.3d ____ (August 16, 2012). Accordingly, it is quite possible, if not likely, that
 10 Discovery will determine that CTX Mortgage Corporation’s involvement in the transaction,
 11 including claims for fraud may reveal themselves through Discovery. Particularly if there are
 12 problems associated with CTX Mortgage Corporation’s endorsement of the Note to any named
 or unnamed third party.

13 On the basis of the foregoing, it is proper and appropriate to enter an Order dismissing
 14 Plaintiff’s claims against CTX Mortgage Corporation at this time, “without Prejudice”.

15 **DATED** this 20th day of October 2012.

16 **KOVAC & JONES, PLLC.**

17 

18 Richard Llewelyn Jones, WSBA # 12904
 19 Attorney for Plaintiffs
 20
 21
 22

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on October 22, 2012, I caused a copy of the **Reply to CTX Mortgage Corporation's Objection to Plaintiff's Proposed Order of Dismissal Without Prejudice** to be served to the following party(ies) and in the manner(s) indicated:

Heidi E. Buck, WSBA No. 41769 ROUTH CRABTREE OLSEN PS 13555 S.E. 36 th St, Suite 300 Bellevue, WA 98006 Tel. 425 213 5534 Fax 425 283 5968 Attorneys for Northwest Trustee Services, Inc .	<input checked="" type="checkbox"/> CM/ECF <input type="checkbox"/> First Class Mail
William Rasmussen WSBA No. 20029 Matt Sullivan WSBA No. 40873 DAVIS WRIGHT TREMAINE LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101-3045 Tel 206 622 3150 Attorneys for Defendants JPMorgan Chase; Mortgage Electronic Registration Systems, Inc. and the Federal National Mortgage Association	<input checked="" type="checkbox"/> CM/ECF <input type="checkbox"/> First Class Mail
Tim J. Filer, WSBA No. 16285 Neil A. Dial, WSBA No. 29599 FOSTER PEPPER PLLC 1111 Third Avenue, Suite 3400 Seattle, WA Suite 3400 Tel. 206.447.4400 Fax 206 447 9700 Attorneys for Defendant CTX Mortgage Corporation	<input checked="" type="checkbox"/> CM/ECF <input type="checkbox"/> First Class Mail

DATED this 22nd day of October, 2012.


 Susan L. Rodriguez